

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.**

XPO CARTAGE, INC

and

**Cases 21-CA-150873
21-CA-164483
21-CA-175414
21-CA-192602**

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS**

**Charging Party's Response In Support of XPO's Request for Special
Permission to Appeal and Charging Party's Opposition to a Hearing by
Videoconference**

Pursuant to Section 102.26 of the National Labor Relations Board's Rules and Regulations, the International Brotherhood of Teamsters (the "Union" or "Teamsters") hereby submit this response in support of XPO's Request for Special Permission to Appeal, and in agreement with XPO's position that the hearing in this case should not be conducted by videoconference.

Charging Party has consistently asserted that there is no need to re-open the record in this case because the Judge considered all pertinent facts and factors in the underlying hearing. The Judge's findings make clear that even under the

Board's new standard set forth in *Supershuttle DFW, Inc.*, 387 NLRB No. 75 (2019), XPO's drivers are statutory employees with Section 7 rights who are entitled to the protections provided by the Act.

As the record has been reopened, however, Charging Party believes that a video hearing in this case would not serve the interests of justice and would be a disservice to all parties involved and to the employees affected by the underlying ruling. Although Charging Party believes that all of these issues have been sufficiently addressed in the underlying hearing, there is no question that this case involves one of the most complex areas of Board law—the analysis of whether a worker is a statutory employee or an independent contractor who falls outside of the Act's protections. This fact intensive analysis is highly dependent not just on documents regarding the relationship between the employer and the putative employees, but on testimony regarding the actualities of such a relationship.

Inherently, remote hearings make it more difficult to solicit truthful testimony from witnesses because of the possibility of witness tampering through means undetectable to other parties (such as off-camera coaching in the middle of testimony or off-camera electronic communications with the testifying witness), because of built in delay that makes adequate cross-examinations and objections by counsel more difficult, and because technological issues could impede the testimony being given and the review of pertinent documents by necessary witnesses. Video hearings by their very nature also make it more difficult for the Judge to make the

types of nuanced credibility determinations that are key to the Judge's ultimate decision.

In this case in particular, these issues are further exacerbated by the fact that multiple witnesses will have to testify with the assistance of Spanish interpreters. Such testimony through an interpreter is burdensome at an in-person hearing, and becomes nearly impossible when every party is in a different location. Further, it is not clear that the low-wage, immigrant drivers who will be testifying in this hearing even have easy access to the up-to-date equipment and high speed internet connections necessary for such remote testimony.

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STATEMENT OF SERVICE

I hereby certify that a copy of **CHARGING PARTY'S RESPONSE IN SUPPORT OF XPO'S REQUEST FOR SPECIAL PERMISSION TO APPEAL AND CHARGING PARTY'S OPPOSITION TO A HEARING BY VIDEOCONFERENCE** was submitted by e-filing to the Executive Secretary of the National Labor Relations Board and to the Division of Judges on July 31, 2020.

The following parties were served with a copy of said document by electronic mail on July 31, 2020:

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Respectfully submitted,
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